



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No.: IT-02-54-AR108bis &  
AR73.3

Date: 23 October 2002

Original: French

**IN THE APPEALS CHAMBER**

**Before:** Judge Claude Jorda, Presiding  
Judge Mohamed Shahabuddeen  
Judge David Hunt  
Judge Fausto Pocar  
Judge Theodor Meron

**Registrar:** Mr Hans Holthuis

**Decision of:** 23 October 2002

**PROSECUTOR**

v

**SLOBODAN MILOŠEVIĆ**

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**PUBLIC VERSION OF THE CONFIDENTIAL DECISION  
ON THE INTERPRETATION AND APPLICATION OF  
RULE 70**

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**Office of the Prosecutor:**

**Ms Carla Del Ponte**

**Amici Curiae:**

**Mr Steven Kay**

**Mr Branislav Tapušković**

**The Accused:**

**Mr Slobodan Milošević**

This is the public and redacted version of the Appeals Chamber's confidential "Decision on the Interpretation and Application of Rule 70" issued today, Wednesday 23 October 2002.

1. This appeal concerns the confidential "Decision on the Prosecution's Motion to Grant Specific Protection pursuant to Rule 70" issued by Trial Chamber III on 25 July 2002 ("Impugned Decision") [also available in a public version] in which it held that Rule 70 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), which protects the sources of certain information given on a confidential basis, did not apply to the evidence of a witness sought to be presented under the terms of that Rule by the Prosecution. The proposed witness is an official of the [ ... ] Government ("Witness").

### A. Procedural History

2. On 8 August 2002, the Government of [ ... ] filed a request for review by the Appeals Chamber of the Impugned Decision pursuant to Rule 108*bis* of the Rules ("Request for Review").<sup>1</sup> On 19 August 2002, the Prosecution filed a response to the Request for Review.<sup>2</sup>

3. On 4 September 2002, the Prosecution filed an interlocutory appeal against the Impugned Decision under Rule 73 of the Rules ("Interlocutory Appeal"),<sup>3</sup> having received certification from the Trial Chamber that interlocutory appeal was appropriate on the question of the nature of Rule 70 evidence, its origin and the manner in which the Trial Chamber was to apply it.<sup>4</sup> The arguments advanced by the Prosecution in the Interlocutory Appeal are similar to those contained in its response to the Request for Review. On 6 September 2002, the Appeals Chamber issued an Order joining the Interlocutory Appeal and the Request for Review in view of the fact that both referred to the Impugned Decision and addressed the same issues ("Order for Joinder").<sup>5</sup> The Order for Joinder further suspended execution of the Impugned Decision, pursuant to Rule 108*bis*(C), and provided for the filing of further submissions in the matter. The accused was ordered to file one submission, which was intended to comprise his response to the Interlocutory Appeal and his comments on the Request for Review pursuant to Rule 108*bis*(B). The same was required from the *amici curiae*. The Prosecution was then ordered to file a submission in reply to these.

<sup>1</sup> "Request of [ ... ] for Review of Decision on the Prosecution's Motion to Grant Specific Protection pursuant to Rule 70".

<sup>2</sup> "Prosecution's Response to the 'Request of [ ... ] for Review of Decision on the Prosecution's Motion to Grant Specific Protection Pursuant to Rule 70'".

<sup>3</sup> "Prosecution's Interlocutory Appeal against the Trial Chamber's 25 July 2002 'Decision on the Prosecution's Motion to Grant Specific Protection pursuant to Rule 70'".

4. No filing was received from the accused. The *amici curiae* and the Prosecution filed their further submissions,<sup>6</sup> and on 18 September 2002 the [ ... ] Government filed a “Reply of [ ... ] to Observations by the Amici Curiae”, in which as a preliminary point it requested leave to make the submission set out in its Reply. Rule 108bis makes no provision for reply from a State requesting review of a decision of a Trial Chamber; however, the Appeals Chamber notes that no objection to this filing has been received from the parties, and accepts it for consideration.

5. All of these documents have been filed before the Appeals Chamber on a confidential basis.

### B. Admissibility of the Request for Review

6. Although the Request for Review has been joined for consideration with the Interlocutory Appeal, it still falls to the Appeals Chamber to consider whether the Request for Review is admissible. Rule 108bis(A) provides that a State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal.

7. The Request for Review was timely filed. With regard to whether [ ... ] has *locus standi*, the Request for Review states that:

[ ... ] is directly affected most obviously by the stripping away of the Rule 70 protections to which it is entitled in relation to the official at issue. [ ... ] is also directly affected because the reach of the Decision extends not only to this particular official, but to all other interviewees/potential witnesses that have been provided by [ ... ] pursuant to Rule 70, and indeed to all documents and other information previously provided by it under that Rule.<sup>7</sup>

The Prosecution supports this assertion, and the *amici curiae* do not address it. The Appeals Chamber considers that [ ... ] is directly affected by the Impugned Decision for the reasons put forward in the Request for Review.

8. With regard to the eligibility of the Impugned Decision for review under Rule 108bis, [ ... ] argues that it presents two issues of general importance relating to the powers of the Tribunal. The first is that of “fundamental procedural fairness, that an information-provider must be given notice and an opportunity to be heard before it is deprived of the protections afforded its information under

<sup>4</sup> “Decision on Prosecution’s Application for Certification under Rule 73(B) concerning Rule 70”, 29 August 2002.

<sup>5</sup> “Order for Joinder of Requests and Scheduling Order”.

<sup>6</sup> “Observations by the *Amici Curiae* on the ‘Prosecution’s Interlocutory Appeal against the Trial Chamber’s 25 July 2002 ‘Decision on the Prosecution’s Motion to Grant Specific Protection pursuant to Rule 70’ and the ‘Request of [ ... ] for Review of Decision on the Prosecution’s Motion to Grant Specific Protection pursuant to Rule 70’”, 13 September 2002; “Prosecution’s Reply to Observations of the *Amici Curiae* on the Prosecution’s Interlocutory Appeal regarding Rule 70”, 18 September 2002.

<sup>7</sup> Request for Review, p.2.

the Tribunal's Rules", as [ ... ] was not heard by the Trial Chamber. The second it characterises as the very foundation for cooperation with the Tribunal relied on by governments and other information-providers, which is the "predictable protections to States and others providing potentially sensitive information" provided by Rule 70 as [ ... ] understands it. [ ... ] submits that the Trial Chamber's retroactive stripping of Rule 70 protections from information already provided has destroyed this foundation, by removing the very predictability on which information providers rely. The Prosecution "does not dispute" that the second of these is of general importance relating to the powers of the Tribunal. The *amici* make no comment.

9. The Appeals Chamber notes that Rule 70 is indeed the basis of cooperation with the Prosecution for governments and other bodies who possess confidential and sensitive information which could assist its investigations. The Impugned Decision relates to the extent to which the Chambers of the Tribunal may intervene in this relationship. As such, the Impugned Decision concerns an issue of general importance relating to the powers of the Tribunal. The Appeals Chamber further considers that the question of procedural fairness raised by [ ... ] is such an issue.

### C. The Impugned Decision

10. In its submission before the Trial Chamber, the Prosecution asked for the Witness to be heard in accordance with paragraphs (C) and (D) of Rule 70. It further requested that that two representatives of the [ ... ] Government be in court during the testimony of the Witness, to deal with matters of national security that might arise.

11. The Trial Chamber held that, in order for paragraphs (C) and (D) of Rule 70 to apply, the evidence of the Witness must satisfy certain criteria set down in paragraph (B) of the Rule. The Impugned Decision found that the criteria as the Chamber saw them were not satisfied, and that Rule 70 did not therefore apply to the evidence of the Witness. However, recognising the right of States to protect their national security interests, the Chamber ordered protective measures designed to match those sought by the Prosecutor on behalf of [ ... ]. Specifically, the Prosecutor was ordered to tailor its examination-in-chief to exclude confidential information; cross-examination was not to be permitted beyond the subject matter of evidence-in-chief; questions as to credibility were permitted only if answers were not liable to reveal confidential information; and the two Government representatives were permitted to be present.

#### D. The questions raised on review and appeal

12. In its Request for Review, [ ... ] claims that the Trial Chamber made three errors. First, it took the Impugned Decision without first hearing [ ... ]; second, it decided that Rule 70 did not apply to the Witness without proper inquiry; and, third, it applied an erroneous legal test in determining whether or not Rule 70 applied.

13. [ ... ] does not argue that the specific measures ordered by the Trial Chamber in the Impugned Decision fail to match the protection offered by Rule 70 in this instance, but rather makes the more general complaint, outlined above, that the decision has destroyed the basis of its cooperation with the Prosecution and rendered Rule 70 “a dead letter”.<sup>8</sup>

14. The Prosecution frames its grounds of appeal slightly differently. First, it alleges that the Trial Chamber erred in concluding that it had the authority to review whether or not the evidence of the Witness fell within Rule 70. Second, it alleges that the Trial Chamber erred in fact in concluding on its own test that Rule 70 did not apply.

15. The Prosecution submits that the protective measures ordered by the Impugned Decision fall short of the safeguards contained in Rule 70(C) and (D), in that they do not include protection against the power of the Trial Chamber to order additional evidence or to compel witnesses to attend trial, as is provided by paragraph (C) of the Rule.

16. In accordance with the Order for Joinder, the Appeals Chamber will discuss these issues together.

#### 1. The interpretation of Rule 70

17. Rule 70 provides as follows:

##### Matters not Subject to Disclosure

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

<sup>8</sup> “Reply of [ ... ] to Observations by the Amici Curiae”, 18 September 2002, p.5.

- (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
- (D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
- (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).
- (F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.
- (G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

18. Before turning to analyse the terms of Rule 70 in detail, the Appeals Chamber considers it important to state the Rule's purpose, for it is that purpose which must guide the resolution of any ambiguities in the Rule's wording or structure. The whole of Rule 70 is concerned with confidential material generally:

- (i) Paragraph (A), which was adopted in February 1994 and originally stood alone in the Rule, is concerned with internal documents and may be disregarded for the purposes of this appeal.
- (ii) Paragraph (B) was inserted in October 1994, and it prevents the disclosure of information provided to the Prosecutor on a confidential basis where that information has been *used* solely for the purposes of generating new evidence, without the consent of the provider. It was designed to encourage States and others (such as humanitarian organisations operating in the relevant territory) to assist the Prosecution (or, under paragraph (F) of the Rule, the Defence). The provider must consent before this information may be disclosed any further – by being presented in evidence or

otherwise. If the information is to be disclosed in evidence, it must be disclosed to the accused in accordance with Rule 66, as paragraph (B) provides.<sup>9</sup>

(iii) The remaining paragraphs, other than the present paragraph (F), were inserted in October 1995. Paragraph (F) deals with information provided to the Defence, and it was added in July 1997. Some inconsequential further amendments were made in November 1997 and April 2001.

19. The purpose of Rule 70(B) to (G) is to encourage States, organisations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected.<sup>10</sup> As Trial Chamber I explained several years ago, "the exceptions to disclosure in Sub-rules 70(B) to (E) were introduced into the rules to permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin."<sup>11</sup> As another Trial Chamber has observed, without such guarantees of confidentiality, it is "almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions."<sup>12</sup>

20. The phrases "information under this Rule" and "testimony, document or other material so provided" in paragraph (C),<sup>13</sup> and "information provided under this Rule" in paragraph (D),<sup>14</sup> are intended to relate back to the "information which has been provided" referred to in paragraph (B).<sup>15</sup> The first issue which the Trial Chamber had to decide, and which now arises in this appeal, is whether the information to which Paragraphs (C) and (D) refer is that which has been "provided to the Prosecutor on a confidential basis" (the first option) or that which has been "provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence" (the second option). The Impugned Decision clearly intended to interpret Rule 70 in accordance with the second option. Paragraphs (C) and (D) deal with the situation where the provider has already given its consent to the information being disclosed further, by being presented in evidence in one form or another. By definition, the information is by this stage no longer being

<sup>9</sup> "[...] and shall in any event not be given in evidence without prior disclosure to the accused."

<sup>10</sup> In general terms, the Trial Chamber appears to have recognised this basic purpose. *See* Impugned Decision, §5.

<sup>11</sup> Prosecutor v. Blaškić, IT-95-14-T, "Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures", 13 November 1997, §10 ("Blaškić Decision"); *see also* Prosecutor v. Brđanin & Talić, IT-99-36-T, "Public Version of the Confidential Decision on the Alleged Illegality of Rule 70, 6 May 2002", §17 ("Brđanin & Talić Decision").

<sup>12</sup> Brđanin & Talić Decision, §18.

<sup>13</sup> "[...] after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided [...]."

<sup>14</sup> "[...] introduce in evidence any information provided under this Rule, [...]."

<sup>15</sup> "[...] the Prosecutor is in possession of information which has been provided [...]."

“used solely for the purpose of generating new evidence”. It becomes a matter of necessary textual interpretation, therefore, that the information referred to in paragraphs (C) and (D) must be that which was provided to the Prosecutor on a confidential basis (the first option), and *not* that which was so provided and which has been used solely for the purpose of generating new evidence (the second option). In the opinion of the Appeals Chamber, the Trial Chamber erred in adopting the second option rather than the first.

21. The Trial Chamber also misinterpreted the terms of paragraph (B) when it rejected the application of Rule 70 to the information in question, on the basis that it was not satisfied that the information

[...] was provided to allow the Prosecutor to pursue lines of inquiry or solely for the purpose of generating new evidence.<sup>16</sup>

Such an interpretation impermissibly introduced a requirement into Rule 70 that the sole purpose of *providing* the information was to generate new evidence, whereas paragraph (B) speaks only of the material having been *used* solely for that purpose. No doubt the purpose of providing information on a confidential basis will in many cases include a purpose (sole or otherwise) that new evidence will thereby be generated, but the limitations imposed by Rule 70(B) are *not* based upon the existence of such state of mind on the part of the provider.

22. In addition, the Trial Chamber explained that the testimony in question did not fall within Rule 70 for the following reasons:

Rather than information, it was the provision of a witness who the Prosecution could have found in any case, and who is corroborating evidence about [ ... ] which the Prosecution already had.

Thus, the Trial Chamber suggested that three characteristics of the testimony at issue, either individually or in combination, prevented it from being information provided under Rule 70 and thus subject to the Rule’s protections. It was testimony, that is “provision of a witness”, “[r]ather than information.”<sup>17</sup> The witness was one the Prosecution “could have found in any case.”<sup>18</sup> And the testimony corroborated other evidence “the Prosecution already had.”<sup>19</sup> The Appeals Chamber considers that none of these characteristics is relevant to determining whether information qualifies under Rule 70.

23. The fact that information is provided in the form of testimony does not exclude it from being “information” or “initial information” provided under the Rule. Indeed, paragraph (C) of the Rule expressly refers to the “*testimony, document, or other material so provided.*” (emphasis added). The

<sup>16</sup> Impugned Decision, §10.

<sup>17</sup> Impugned Decision, §10 (emphasis added).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



Trial Chamber appears to have adopted an overly narrow interpretation of the term “information.”<sup>20</sup> When a person possessing important knowledge is made available to the Prosecutor on a confidential basis, not only the informant’s identity and the general subject of his knowledge constitute the “information” shielded by Rule 70, but also the substance of the information shared by the person – often, as in this case, presented in summary form in a witness statement.

24. The Trial Chamber’s second and third bases for excluding the testimony at issue from the scope of Rule 70 constitute hypothetical factual conclusions: that the Prosecutor could have found the Witness without the help of the providing government and that the testimony corroborated other evidence the Prosecutor already had. Even if those conclusions were true, they would not support the Trial Chamber’s legal conclusion that the testimony in question did not constitute information provided under Rule 70. That the Prosecutor might have identified an informant on her own does not mean that the informant’s knowledge was not in fact “provided . . . on a confidential basis” (or indeed that it was not “used solely for the purpose of generating new evidence”). That the informant’s statement happens to corroborate other evidence possessed by the Prosecutor again does not mean that the statement was not “provided . . . on a confidential basis” or that it was not “used solely for the purpose of generating new evidence.” (emphasis added).

25. All that Rule 70 requires is that the information “was provided to the Prosecutor on a confidential basis.” As mentioned in paragraph 20 *supra*, for purposes of paragraph (B), the information must also be “used solely for the purpose of generating new evidence,” but for paragraphs (C) and (D) that requirement necessarily drops out, for once the information is introduced as evidence at trial, it by definition is no longer “used solely for the purpose of generating new evidence.”

26. In adopting its restrictive reading of Rule 70, the Trial Chamber seems understandably to have been concerned that the Prosecutor and cooperating governments, organisations, or individuals might abuse the Rule’s protections to the detriment of accused persons. The Appeals Chamber observes that two safeguards exist to ensure that any misuse does not deprive accused persons of their rights to challenge the evidence against them and to receive a fair trial.<sup>21</sup> First, as explained more fully below in section D.2, the Trial Chambers do possess a limited authority to police the application of Rule 70 in order to prevent its misapplication. Second, paragraph (G) of Rule 70 expressly empowers the Trial Chambers to “exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” Designed to ensure that the restrictions in paragraphs

<sup>20</sup> The *Amici Curiae* also advance such an interpretation before the Appeals Chamber. See “Observations by the *Amici Curiae* on the ‘Prosecution’s Interlocutory Appeal against the Trial Chamber’s 25 July 2002 ‘Decision on the Prosecution’s Motion to Grant Specific Protection pursuant to Rule 70’ and the ‘Request of [ ... ] for Review of Decision on the Prosecution’s Motion to Grant Specific Protection pursuant to Rule 70’”, 13 September 2002, §28.

(C) and (D) do not undermine the bedrock requirement of fair trial when the Rule is properly invoked, paragraph (G) also gives Trial Chambers a tool to protect that requirement if the Rule has been misused.

27. The decision of the Trial Chamber was thus vitiated by errors of law,<sup>22</sup> and (as all the material necessary is available to it to do so) it now becomes the obligation of the Appeals Chamber to determine for itself whether Rule 70 applies to that information.

## 2. The application of Rule 70 to the present case

28. The Prosecutor submits that the Trial Chamber exceeded its authority by characterising for itself evidence which the Prosecution, after having obtained the consent of the provider, had presented under the terms of Rule 70(C). According to the Prosecutor, it is for the Prosecutor and the information provider to make that characterisation. The [ ... ] Government allows that the Trial Chamber may examine whether the information was indeed provided in accordance with Rule 70(B).<sup>23</sup>

29. The Appeals Chamber agrees with the [ ... ] Government that Chambers of the Tribunal do indeed have the authority to assess whether information has been provided in accordance with Rule 70(B) and so benefits from the protections afforded by that Rule. However, such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis, bearing in mind that the providing of information may not be confined to a single act, but may consist of a process involving several acts. This is an objective test. The Chambers may be satisfied of this simply by a consideration of the information itself, or by the mere assertion of the Prosecutor, or they may require confirmation from the information provider or, where the information is in the form of a document, for example, there may be something on the face of the document which indicates that it was indeed provided on a confidential basis.

30. In the current matter, the Trial Chamber correctly found that it had the power to determine whether the evidence of the Witness fell within the terms of Rule 70. As explained in paragraph 20, its error was in the test which it applied.

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<sup>21</sup> See Statute Article 21(2), (4)(e).

<sup>22</sup> *Prosecutor v. Milosević*, IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002, §6.

<sup>23</sup> "Reply of [ ... ] to Observations by the Amici Curiae", 18 September 2002, p.3.

31. The Appeals Chamber, in determining whether the information was provided on a confidential basis and whether the Prosecutor obtained the consent of the provider to its presentation in evidence, sees no need in the present case to hear the parties, as these issues are agreed by both of them. Where, however, there is any doubt upon the face of the material placed before a Trial Chamber when the protections of Rule 70 are sought, the Trial Chamber should invite the party which provided the information and the Prosecutor to supply evidence upon these issues before ruling upon the application of Rule 70 to the information in question. The Trial Chamber should give the information provider an opportunity to be heard on the question by filing written submissions, but need not allow additional oral submissions by the information provider unless the Trial Chamber determines that the interests of justice so require.

32. The Appeals Chamber is satisfied that Rule 70 applies to the information to be given in evidence by the Witness in the present case. The appeal must therefore be allowed.

33. The Prosecutor sought, in addition to an order that Rule 70 applied to that information, an order that two representatives of the provider be present in court whilst the evidence is given. Rule 70 does not provide for such an order, but it is within the discretion of any Trial Chamber to make such an order. Such an order has already been made by the Trial Chamber, and it is confirmed by the Appeals Chamber.

**E. Disposition**

**FOR THE FOREGOING REASONS**

**THE APPEALS CHAMBER**

**PURSUANT TO** Rules 70, 73, 75, 107 and 108*bis* of the Rules;

**GRANTS** the Request for Review and the Interlocutory Appeal;

**QUASHES** the Impugned Decision,

and **ORDERS** as follows:

- 1) The evidence of the Witness shall be heard in accordance with Rule 70 paragraphs (B) to (G);
- 2) Two representatives of the [ ... ] Government may be present in the courtroom during the testimony of the Witness.

Done in both English and French, the French text being authoritative.

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Judge Claude Jorda  
Presiding

Dated this twenty-third day of October 2002  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**